87-297

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION, INC.; and DOMINICK EVANGELISTA, individually and as President of the Port Authority Police Benevolent Association, Inc.,

Petitioners,

vs.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent,

Kirk Nelson, Donald F. Delano, Dennis Flavin, Charles Cossentine, Eugene Ceccarella and George Albin *(Intervenors).*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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vs.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

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Kirk Nelson, Donald F. Delano, Dennis Flavin, Charles Cossentine, Eugene Ceccarella and George Albin *(Intervenors)*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals was correct in affirming the dismissal of the complaint upon the ground that Respondent, The Port Authority of New York and New Jersey, is immune from suit pursuant to the Eleventh Amendment to the Constitution.

COUNTERSTATEMENT OF THE CASE

The Port Authority of New York and New Jersey (Port Authority) was created on April 30, 1921 by a Congressionally consented-to Compact between the States of New York and New Jersey. The Compact established the Port Authority as a joint and common agency of the States of New York and New Jersey. N.J.S.A. 32:1-1 (West 1963); N.Y. Unconsol. Laws Sec. 6401 (McKinney 1979). The Port Authority was created and is administered as a state agency and not as a political subdivision. N.J.S.A. 32:1-5; N.Y. Unconsol. Laws Sec. 6405. The Port Authority is governed by a Board of twelve Commissioners, six from each state. The Commissioners are appointed by the respective state governors and the governor of each state has the power to veto the actions of the Commissioners appointed from his state. N.J.S.A. 32:1-17, 32:2-9; N.Y. Unconsol. Laws Secs. 6417, 7151, et seq. Over the years the legislatures of the two states have authorized and directed the Port Authority to undertake the effectuation of various projects for the benefit of the people of the two states.

The Port Authority's bi-state transportation operations include: six interstate vehicular crossings, the George Washington Bridge, the Lincoln and Holland Tunnels, the Bayonne Bridge, Outerbridge Crossing and Goethals Bridge; four airports, Newark International Airport, Teterboro Airport, Kennedy International Airport and LaGuardia Airport; two heliports, the Downtown Manhattan Heliport and the West 30th Street Heliport; seven marine terminals, Elizabeth Marine Terminal, Port Newark, New York City Passenger Ship Terminal, Brooklyn Marine Terminal, Columbia Street Marine Terminal, Erie Basin Marine Terminal and Red Hook Marine Terminal; three industrial parks, Elizabeth Industrial Park, Bathgate Industrial Park and Yonkers Industrial Park; the Port Authority Bus Terminal; New York Union Motor Truck Terminal; The Teleport; The World Trade Center and the commuter railroad operated by the Port Authority Trans-Hudson Corporation.

To protect citizens using its facilities, the Port Authority employs its own police force, presently consisting of approximately 1,026 Officers, 124 Sergeants, 78 Detectives, 9 Detective

Sergeants, 55 Lieutenants, 2 Detective Lieutenants, 15 Captains, 5 Deputy Inspectors, 2 Inspectors, 1 Assistant Superintendent/Chief Inspector, and 1 Superintendent of Police. Port Authority police officers, pursuant to state legislation, have all of the powers conferred by law on police officers of the state and have state-wide jurisdiction. N.J.S.A. 32:2-25; N.Y. Crim Proc. Law Sec. 1.20 sub'd. 34(k); 34-a(a)(b)(c) (McKinney 1981).

The underlying dispute in this matter involves the Port Authority's use in 1985 of a promotion list, created in 1981 and designated as a three year list, to make six promotions to sergeant. In November 1983, the Port Authority, anticipating the expiration of the 1981 list, announced that a written examination was to be given on February 11, 1984 which would be used to establish a new list of qualified candidates for promotion to sergeant. This new list of qualified candidates would have reflected the growing number of women and racial minorities on the police force. On January 31, 1984 the Executive Board of the PAPBA voted to adopt a motion to boycott this examination and directed that charges be brought against any member not abiding by the approved boycott.

While negotiations for a new promotion procedure were ongoing, a serious shortage of personnel in the sergeant ranks developed. Finally, on January 25, 1985, the Port Authority notified the PAPBA that due to manpower and operational needs, it would "extend the life of the Police Sergeant eligible list which initially expired [1984] to permit additional appointments be made from the list." Before any promotions were made from the extended list, the PAPBA moved before the Port Authority Labor Relations Panel (Panel)[1] to enjoin use of the

[1] The Port Authority Employment Relations Panel adjudicates disputes between the Port Authority and its various labor organizations regarding rights and obligations flowing from the employment relationship. The Panel has duties similar in scope and nature to that of the Public Employment Relations Board (PERB) of the State of New York and the New Jersey Public Employment Relations Committee (PERC).

(Footnote continued)

list. By written decision dated March 6, 1985, the Panel refused to issue the requested injunction. Decisions of the Panel are reviewable in state court pursuant to N.J.S.A. 32:1-175 (West Supp. 1987); N.Y. Unconsol. Laws Sec. 7141 (McKinney Supp. 1987).

Instead of seeking state court review from what is essentially a labor dispute, the PAPBA, alleging a violation of 42 U.S.C. §1983, filed a complaint in the United States District Court for the District of New Jersey on March 28, 1985 contending that the use of the 1981 list deprived its members of liberty and property without due process. On the District Court's own motion, the PAPBA's motion for a preliminary injunction was consolidated with a hearing on the merits. At this hearing, the PAPBA never informed the District Court of the proceeding it had brought before the Panel or of the Panel's decision denying the PAPBA's application for an injunction requested by PAPBA.

On December 19, 1985, relying on the proofs submitted, the District Court delivered an opinion stating that the PAPBA was deprived of a property interest without due process. It directed the Port Authority not to make further promotions from the extended list and directed that the six promotions made from the list be set aside.

The Panel consists of three members. One member is appointed subject to the written recommendation, after consultation with the employee organizations, of the Chairman of the New Jersey Public Employment Relations Commission, another member is appointed subject to the written recommendation, after consultation with the employee organizations, of the Chairman of the New York Public Employment Relations Board, and the third member, the Chairman of the Panel, is appointed subject to the joint written recommendation, after consultation with employee organizations, of the Chairman of the New Jersey Public Employment Relations Commission and the Chairman of the New York Public Employment Relations Board. The members are appointed for staggered terms of three years. The Panel, among other things, adjudicates alleged violations of the Port Authority of New York and New Jersey Labor Relations Instruction. The Instruction mandates that the Port Authority may not unilaterally change "salaries, wages, hours and other terms and conditions of employment." See The Port Authority of New York and New Jersey Labor Relations Instruction, section III and section XI A(D).

After the filing of the Court's opinion, but before the entry of an order, the six individuals whose promotions were to be set aside were granted leave to intervene as defendants.

Prior to a hearing on the merits the District Court granted a motion to dismiss the complaint on the ground that the Port Authority is protected by Eleventh Amendment immunity and is therefore not a "person" amenable to suit pursuant to 42 U.S.C. §1983.

By decision and judgment dated May 27, 1987, 819 F.2d 413 (3d Cir. 1987), the Court of Appeals affirmed the dismissal of the Section 1983 action against the Port Authority upon the ground that the Port Authority as an arm of the States was entitled to Eleventh Amendment immunity.

Petitioners are being less than candid with the Court regarding the current status of the promotion procedure at issue. During the pendency of this action, the PAPBA and the Port Authority mutually agreed on a promotion procedure, a promotion examination has been given, a new promotion list established and promotions made from that list. Accordingly, the only dispute now remaining is the PAPBA's demand that the promotion of the six sergeants promoted from the 1981 list be invalidated and that those individuals be demoted.

REASONS FOR DENYING THE WRIT

Contrary to the contention of petitioners, the decision of the Third Circuit below is totally consistent with the decisions of this Court and those of other circuits.

A. *There is No Conflict with Prior Decisions of this Court.*

Petitioners claim that the decision of the Third Circuit below conflicts with the decision of this Court in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), which held that local government bodies were persons amenable to suit within the meaning of 42 U.S.C. §1983. By so arguing, however,

petitioners beg the question. Thus, beyond merely stating their conclusory proposition, petitioners completely fail to establish that the Port Authority is a "local government body" within the meaning of *Monell*.

In sharp contrast, however, the Third Circuit below:

> ". . . conclude[d] that the combined legislative-judicial characterization of the Authority indicates an intention on the part of New York and New Jersey that the Authority be considered a state agency for purposes of Eleventh Amendment immunity." 819 F.2d 413 at 415.

In so concluding, the Court of Appeals relied upon a long line of precedent so holding, to wit:

> "The state and federal courts of New York and New Jersey have consistently, whenever confronted with the question of whether or not the Authority is an arm of the state government, held that the Authority is a state agency performing functions on behalf of the state. See, e.g. *Mineo* v. *Port Authority*, 779 F.2d at 949 ('[f]rom its inception. . ., the Port Authority has been an entity of the two compacting states'), *cert. denied*, ____ U.S. ____, 106 S.Ct. 3297, 92 L.Ed.2d 712 (1986); *Newark* v. *Board of Taxation*, 54 N.J. 171, 175, 254 A.2d 513, 515 (the Authority was created by the two states as 'their joint agency'), *cert. denied*, 396 U.S. 987, 90 S.Ct. 483, 24 L.Ed.2d 452 (1969); *The Port Authority* v. *Bosco*, 193 N.J. Super. 696, 700, 475 A.2d 676, 678 (1984) (per curiam) (' "[q]uotations of this nature could be multiplied indefinitely' ") (quoting *Whalen* v. *Wagner*, 4 N.Y.2d 575, 152 N.E.2d 54, 57, 176 N.Y.S.2d 616, 619 (1958)); *Trippe* v. *Port of New York Authority*, 14 N.Y.2d 119, 122, 123, 198 N.E.2d 585, 586, 249 N.Y.S.2d 409, 410, 411 (1964) (the Authority is a 'governmental agency' and a 'direct agency' of the two states).' " *Id.*

The Third Circuit took particular note of the fact

> ". . .that this long-standing judicial characterization of the Authority has never been questioned by either state legislature despite the numerous opportunities to overrule these decisions presented by the periodic amendments the legislatures have made to the statutes." *Id.*

Consequently, it is clear that petitioners have failed to establish any conflict whatsoever with *Monell.*

So too, petitioners have totally failed to establish that the Third Circuit has misapplied this Court's decision in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). Although petitioners' argument is hardly a model of clarity, petitioners seem to be focusing mainly on the financial structure of the Port Authority and what they argue is its independence from the state treasuries. There are several fallacies to petitioners' approach.

First and foremost, petitioners obviously completely misapprehend the scope of Eleventh Amendment immunity, considering their statement on page 9 of the petition that " . . . the rationale behind the Eleventh Amendment is a prohibition of (sic) raiding state treasuries." Petitioners are simply mistaken. In point of fact, suits seeking injunctive relief against the state, such as the instant suit[2], are as much barred by the Eleventh Amendment as are suits for money damages. See, *inter alia*, *Alabama* v. *Pugh*, 438 U.S. 781, 782 (1978).

Because of their obvious misunderstanding, petitioners continue to mischaracterize this Court's decision in *Lake Country Estates, supra*, by implying that the potential liability of the state treasuries is the most important factor to be considered

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[2] Thus, the statement on page ll of the petition " . . . that . . . any damages awarded in this action would not be paid out of either state's treasury" is a glaring *non sequitir.*

for a determination of state agency status with respect to Eleventh Amendment immunity. However, this Court has never held such a factor to be the *sine qua non* for immunity. Indeed, in commenting on this factor in *Lake Country Estates*, this Court simply made the observation that "some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself", 440 U.S. at 400-401 (footnote omitted). Nowhere in the *Lake Country Estates* opinion, however, is there any indication that this factor is to be controlling.

Moreover, petitioners simply are misconstruing the decision of the Third Circuit in this regard. The Court of Appeals below was under no illusion, nor did it ever hold, that some potential financial dependency on the part of the Port Authority dictated their finding of state agency status. Indeed, the Third Circuit specifically noted that:

> ". . .the Authority's current funding structure does not provide conclusive evidence that the Authority is an agency of the state . . ." 819 F.2d at 416.

Nevertheless, the Court of Appeals was able to find the Port Authority's funding to be "clearly distinguishable from the funding of the RPA found damaging to that agency's immunity claim in *Lake Country Estates*." *Id.* That flaw was the fact that the Tahoe Regional Planning Agency received its funding from the counties rather than the state governments. See in this regard *Lake Country Estates*, 440 U.S. at 401-402. In sharp contrast, the Third Circuit found with respect to the Port Authority:

> "The Authority's ability to be self-supporting as a result of the General Reserve Fund does not support the same conclusion. Significantly, the uses to which the money from the Authority's General Reserve Fund may be put are strictly circumscribed by periodic legislation and may only be dedicated to purposes within the Authority's statutory mandate and for the benefit of the citizens of the two states. This is in stark

> contrast to the RPA's use of its funds, which are directed towards the needs of the counties and their residents, and spent with no legislative input from the states. Thus, *although the Authority is no longer directly funded by the states, we conclude that the history of its financial structure, and the statutory constraints placed on the use of its funds, indicate that the Authority is considered an arm of the states by New York and New Jersey.*" 819 F.2d at 416. (emphasis added)

Petitioners' other attempts to create a conflict between the decision below and *Lake Country Estates* are similarly without merit. Completely ignoring the numerous other indicia of state control listed by the Third Circuit, *e.g.* gubernatorial appointment and legislative confirmation of Commissioners; the gubernatorial veto; the requirement of an annual report to the legislatures; the requirement of legislative authorization for Port Authority projects, etc., (819 F.2d at 417), petitioners boldly state, on the basis of a mere trial court opinion, namely, *People of the State of New York* v. *The Port of New York Authority*, 64 Misc. 2d 563 (Sup. Ct. N.Y. Co. 1970), that the states must sue the Port Authority in order to control it (Petition at 11). However, petitioners clearly are misapplying the case. The matter arose in such posture for the simple reason that injunctive relief does not lie against the Port Authority in state court unless actions therefor are brought by the state's attorney general. See in this regard, N.J.S.A. 32:1-161; N.Y. Unconsol. Laws Sec. 7105.

Finally, petitioners rely on *County of Bergen* v. *Port of New York Authority*, 32 N.J. 303 (1960) for their conclusory proposition that the Port Authority is performing functions similar to a county. Nowhere does that case so hold. *County of Bergen* merely held that the County had no standing to sue with respect to the Port Authority's activities at Teterboro Airport and that, in fact, it was the Port Authority and not Bergen County which represented the public interest with respect to the airport, 32 N.J. at 312. Such a statement certainly falls far short of contradicting the long line of precedent, cited by the Third Circuit, fully establishing that the Port Authority is an agency of

the States of New York and New Jersey. Quite obviously, petitioners have completely failed to establish any conflict between the decision of the Third Circuit and prior decisions of this Court.

B. *The Decision Below Does Not Conflict with Third Circuit Precedent*

Petitioners also argue that the decision below conflicts with a prior decision in the Third Circuit, namely *Blake* v. *Kline*, 612 F.2d 718 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). Petitioners' proposition is absurd on its face. While it might make some sense to argue the existence of a conflict if the Court had completely ignored or had given short shrift to the prior *Blake* decision, it makes no sense whatsoever here where the decision below is fully harmonized with *Blake*. Indeed, the Circuit Court found that by analyzing the Port Authority pursuant to factors they previously had laid down in *Blake*, *Blake*, in fact, compelled the result, to wit:

> "Thus, under the more rigorous requirements of *Blake* v. *Kline*, the Port Authority is clearly an agency of the state and is thus entitled to Eleventh Amendment immunity." 819 F.2d at 418.

In any event, intracircuit conflict is not normally a sufficient reason for this Court to grant certiorari. Such "conflicts" generally are to be resolved by a rehearing *en banc*. See in this regard, R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, ¶4.6 (6th Ed. 1986), citing *Davis* vs. *United States*, 417 U.S. 333, 340 (1974).

Moreover, petitioners' main basis for claiming a conflict at bar is what they perceive to be the greater weight accorded by the *Blake* Court to the "financial independence" factor. Petitioners' reliance, however, is completely misplaced, since in *Blake*, a money judgment was being sought in contract and in tort against the trustees of a state employee retirement fund. Here, it cannot be overemphasized, only injunctive relief is being sought. Furthermore, to the extent that *Blake* did hold the

"financial independence" factor to be "most important", 612 F.2d 718, 723, that holding must give way to this Court's decision in *Lake Country Estates* in which, as we previously have noted, this Court failed to find that any one factor was in and of itself determinative of immunity.

C. *There is No Intercircuit Conflict to be Resolved by this Court*

Finally, petitioners urge that the decision below conflicts with decisions in other circuits which have found some other public bodies to be amenable to suit. However, petitioners have failed to establish anything more than the fact that under the authorities they cite, those courts were unwilling to find that those particular bodies were state agencies for purposes of Eleventh Amendment immunity.

Indeed, we respectfully submit that as this Court's decision in *Lake Country Estates*, *supra*, makes crystal clear, a determination of Eleventh Amendment immunity for any particular body is so dependent upon factors specific to that body, each case must be, by definition, almost *sui generis*. Thus, we further submit, it would be appropriate to speak of intercircuit conflict, if and only if, the circuits have divided on the question with respect to the same or a virtually identical body. Petitioners simply have failed to establish any such conflict in the instant case.

More specifically, *Raysor* v. *Port Authority of New York and New Jersey*, 768 F.2d 34 (2d Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1227 (1986), cited by petitioners on page 15 of their petition, does not establish such a conflict since the Eleventh Amendment issue simply was not raised. See in this regard *O'Donnell* v. *The Port Authority of New York and New Jersey*, 84 Civ 8188 (CES) (S.D.N.Y. September 3, 1987) (RA4).[3] As petitioners themselves are forced to acknowledge, all the Second Circuit held in *Raysor* was that a §1983 violation against the Port Authority was neither properly pleaded nor proven.

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[3] "RA" followed by a numeral refers to pages in the Respondent's Appendix.

Doris Trading Corporation v. *The SS Union Enterprise*, 406 F.Supp. 1093 (S.D.N.Y. 1976) and *Principe Compania Naviera, S.A.* v. *Board of Commissioners of the Port of New Orleans*, 333 F. Supp. 353 (E.D. La. 1971), were district court decisions in which money judgments were being sought and which antedated this Court's decision in *Lake Country Estates*. Since these opinions obviously do not employ the analysis delineated by this Court in *Lake Country Estates*, *supra*, they cannot serve to establish any conflict with the decision of the Third Circuit below.

Jacintoport Corp. v. *Greater Baton Rouge Port Commission*, 762 F.2d 435 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986), is similarly distinguishable from the instant case since a money judgment in addition to injunctive relief was being sought therein. The Fifth Circuit, therefore, weighed the "financial independence" factor quite heavily, 762 F.2d 440-442. Moreover, a simple reading of the *Jacintoport* decision clearly establishes that the Fifth Circuit was less impressed with the consistency of treatment of the Greater Baton Rouge Port Commission as a state agency by the Louisiana courts, *Id.* at 439-440, than was the Third Circuit with both the legislative and judicial characterization of the Port Authority by the States of New York and New Jersey in the case at bar. See Subpoint A, *supra*.

In short, it is clear that the Fifth Circuit in *Jacintoport* applied the same criteria as did the Third Circuit below, i.e. *Lake Country Estates* and *Blake*. The different results are explained by the fact that the relief being sought and the characteristics of the agencies involved were different.

Finally, we note that very recently the United States District Court for the Southern District of New York in *O'Donnell*, *supra*, dismissed a complaint against the Port Authority in a §1983 case upon the ground that the Port Authority was immune from suit under the Eleventh Amendment (RA4). *O'Donnell* is thus fully in accord with the Third Circuit.

In view of the foregoing, it is clear that petitioners have failed to establish any basis whatsoever for this Court to grant their petition for a writ of certiorari.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Denied.

Dated: October 25, 1987

Respectfully submitted,

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APPENDIX

RESPONDENT'S APPENDIX

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEORGE O'DONNELL,

Plaintiff,

– against – 84 CIV. 8188 (CES)

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,

Defendants.

New York, New York
September 3, 1987
3:00 p.m.

Before:

HON. CHARLES E. STEWART,

District Judge

ECKHAUS & SCOLNICK,
Attorneys for plaintiff,

STEVEN ECKHAUS,
Of Counsel

PHILIP A. MAURER,
Attorney for defendant
Port Authority of New York
and New Jersey

THE COURT: Gentlemen, I have reviewed the record and have reached some conclusions which I will give you. It has not been an easy job. I will give you my opinion now.

In this action plaintiff seeks relief under section 1983, claiming in count one, which is the only remaining count, all others having been dismissed, that he has been deprived of various constitutional rights. Prior to the fall of 1984 plaintiff had been active in the Port Authority union, the Patrolmen's Benevolent Association, and in the course thereof had criticized some of its actions. He also had been involved in legal matters in which he took positions apparently opposed to that taken by the Port Authority.

In September 1984, plaintiff was involved in an episode in which it was alleged by a superior officer, Lieutenant Finnegan, that plaintiff had gone off duty without permission to do so in violation of a return roll call. It was alleged that he was present when the lieutenant issued the order for a return roll call but thereafter went off duty prematurely in disregard of these instructions. At that time the defendant Captain Elique had just been placed in charge of the Port Authority Bus Terminal where plaintiff was assigned to work. Pursuant to the rules of the Port Authority, Elique summoned plaintiff to his office on October 17, 1984, to serve him with these charges. Plaintiff arrived with Mark O'Neill, a union delegate, to assist him. Elique remained seated at his desk and plaintiff was seated in front of him. O'Neill was seated to the right and to the rear of plaintiff who was separated from O'Neill by a small table.

While Elique was serving the charges on plaintiff Elique claims that plaintiff removed his shoes and socks and crossed his right knee with his left foot, left leg. Elique, presuming that plaintiff was trying to aggravate him, said and did nothing about this. After Elique finished presenting the charges, the meeting, which took about five or six minutes, ended. Neither plaintiff nor O'Neill said anything at the meeting. Plaintiff denies that he removed his shoes and socks. O'Neill testified that he did not see plaintiff remove his shoes and socks, but emphasized that he could not say that it did not happen. Also, he declined to sign

an affidavit later that it did not happen and required that affidavit be revised to state that he did not observe it.

At the meeting plaintiff had a tape recorder which he turned on and kept hidden so that Elique was not aware of it. Elique testified that when he learned of this it suggested to him that plaintiff hoped to incite Elique into making incriminating or inflammatory remarks by taking off his shoes and socks.

Two sergeants spoke to Elique about an hour and a half after the episode and asked about plaintiff taking off his shoes and socks and whether it had happened. They said they had heard about it from other police officers. This suggests that plaintiff had reported the episode to others. In any event we find that, based on all the evidence, plaintiff did remove his shoes and socks. Plaintiff has failed to show by a preponderance of the evidence that Captain Elique's testimony was not accurate and truthful. Thereafter Captain Elique discussed the matter with Inspector Boland, who accepted Elique's recommendation that plaintiff be examined by a psychiatrist.

Boland arranged for plaintiff to see Dr. Hess, which he did on November 5. There was no evidence that Boland gave any instructions to, or made any requests of, Hess other than to schedule the examination. On November 5, when plaintiff appeared before Dr. Hess, plaintiff announced that he had a tape recorder and intended to use it. Dr. Hess said that he wouldn't allow it, but plaintiff insisted, and then Dr. Hess refused to go ahead with the examination. He filed a report that plaintiff was "psychiatrically unfit for police duty which would require carrying a gun until an adequate examination can be obtained."

Pursuant to Dr. Hess's record Boland issued instructions as provided by the rules that plaintiff be placed on medical restriction and that his gun, shield and identification card, his ID card, be taken from him. This meant that plaintiff had to stay at home unless he received permission to leave, which incidentally was granted him on request. And he continued on full pay.

Subsequently, in early December, plaintiff agreed to a medical exam without a tape recorder and was found by another doctor to be fit to return to duty.

We find that there was no impropriety by either Elique or Boland at any stage of these proceedings.

Subsequently, plaintiff was found to have acted improperly by leaving the return roll call without permission and was docked two days' pay. Plaintiff complains about a missing tape recording of the radio calls in connection with the return roll call episode. Since the charge against plaintiff, however, depended not on what was carried on the radio but on the oral orders of Lieutenant Finnegan, given while plaintiff was present, the tape recording would not have been relevant.

Both Elique and Boland testified that they had no interest in the affairs of the union, had no reason to interfere in any way with union activities and were not aware that plaintiff was running for office at the time of the episode in question.

There is no evidence to support plaintiff's contention that Elique and Boland acted to prejudice plaintiff's efforts to be elected to union office. Accordingly, we grant defendants' motion to dismiss the complaint as to the two individual defendants, including the charge of false imprisonment which was added at the last moment.

With respect to the Port Authority there is no evidence to support plaintiff's claims as to it, and in any event under the Eleventh Amendment the Port Authority is not amenable to suit in this case. I am relying on a Third Circuit opinion, Port Authority Police Benevolent Association v. The Port Authority, 819 F.2d 413 (3d Cir.1987). The plaintiff has pointed to a Second Circuit decision, Raysor v. The Port Authority, 768 F.2d 34 (2d Cir.1985), which I believe is not pertinent, because the question of the Eleventh Amendment immunity was not raised in that case.

With respect to the Port Authority, none of its rules which are here in question were shown to be unconstitutional and they were properly applied in a constitutional manner.

Gentlemen, I want to thank counsel for adjusting their schedules to mine. I appreciate everything you did to help me. I reached a decision which I believe is appropriate from the evidence. As is frequently the case I wish I could decide the case for both parties.